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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253✓
of the Communications Act--	)	
Competitive Bidding	)	
 Amendment of Part 22 of the	 )	
Commission's Rules to Provide for the	)	
Filing and Processing of Applications for	)	CC Docket No. 90-6
Unserved Areas in the Cellular Service	)	
and to Modify Other Cellular Rules	)	

**NINTH REPORT AND ORDER**

Adopted: August 23, 1996

Released: November 7, 1996

By the Commission:

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. In this *Ninth Report and Order*, we adopt auction rules for mutually exclusive applications for Cellular Unserved Phase I and Phase II service areas.<sup>1</sup> Initial cellular systems operators were given a five-year period during which to expand their systems within Metropolitan Statistical Areas (MSAs) and Rural Statistical Areas (RSAs) in which they are licensees.<sup>2</sup> We adopted an application processing scheme that has two phases for all cellular markets in which the five-year build-out period has expired or will expire in the future. Phase I is a one-time process that provides an opportunity for eligible parties to file competing applications for authority to operate a new cellular system in, or to expand an existing cellular system into, unserved areas as soon as these areas become available. Phase II is an ongoing process that allows eligible parties to apply for any unserved areas that may

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<sup>1</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7387, 7388 (1994) ("*Competitive Bidding MO&O*").

<sup>2</sup> See Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, CC Docket No. 90-6, 6 FCC Rcd 6185, 6196-97 (1991) ("*First R&O/MO&O*").

remain in a market after the Phase I process is complete. Thus, the cellular unserved areas were created from the geographic area not covered by the Cellular Geographic Service Area (CGSA)<sup>3</sup> of each licensee on each frequency block at the close of the five-year build-out period.<sup>4</sup> In a *Notice of Proposed Rule Making* we sought comment on proposed rules for the acceptance, processing, and selection of applications for unserved areas in the Cellular Service.<sup>5</sup> In a subsequent *Report and Order*, we adopted application filing and processing procedures.<sup>6</sup>

2. We now adopt competitive bidding rules for licensing mutually exclusive applications for unserved areas filed after July 26, 1993, in light of the competitive bidding authority contained in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").<sup>7</sup> In adopting these rules, we reiterate our goals for the provision of service in unserved areas: (1) fostering the creation of a seamless and integrated nationwide cellular service, so that subscribers can receive high quality cellular service throughout the nation, and (2) making cellular service available to the public as expeditiously as possible.<sup>8</sup>

3. Based on our experience in licensing such services as broadband and narrowband Personal Communications Services (PCS) through competitive bidding, we believe this system will provide for awarding the Cellular Unserved Area Phase I and Phase II licenses ("cellular unserved area licenses") in an efficient and cost-effective manner. Competitive bidding will award licenses quickly to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Additionally, competitive bidding will recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C) of the Communications Act.<sup>9</sup>

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<sup>3</sup> The CGSA is the geographic area within an MSA or RSA that is served by an authorized cellular system.

<sup>4</sup> *First R&O/MO&O* at 6200, ¶¶ 31-34. The unserved areas are generally within the borders of cellular markets, namely MSAs, RSAs, and the Gulf of Mexico Statistical Area (GMSAs). Two cellular systems are licensed in each market on separate frequency blocks. *See also* Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Notice of Proposed Rule Making*, CC Docket No. 90-6, 5 FCC Rcd 1044, 1047, ¶ 22 (1990) ("*Cellular NPRM*"); *see also*, 47 C.F.R. § 22.949 (a) and (b).

<sup>5</sup> *Cellular NPRM*, 5 FCC Rcd at 1050, ¶¶ 34-60.

<sup>6</sup> *First R&O/MO&O*, 6 FCC Rcd at 6196-97, ¶¶ 18-22.

<sup>7</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. §§ 309(j) and 332).

<sup>8</sup> *First R&O/MO&O*, 6 FCC Rcd at 6187, ¶ 2.

<sup>9</sup> Communications Act of 1934, as amended, 47 U.S.C. §§ 151-173 ("*Communications Act*").

## II. BACKGROUND

4. In February 1990, the Commission initiated a proceeding to adopt rules to govern the acceptance, processing, and selection of applications for authority to operate initial cellular systems in unserved areas of cellular markets.<sup>10</sup> In 1991, the Commission adopted lottery procedures for selecting applications for unserved areas.<sup>11</sup> In so doing, however, we stated that we would revisit our decision to use lotteries for unserved area applications if we received congressional authority to conduct competitive bidding.<sup>12</sup> On August 10, 1993, the President signed the Budget Act which added Section 309(j) to the Communications Act. This amendment gives the Commission express authority to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for initial licenses. In the *Notice of Proposed Rule Making* implementing the Budget Act, we sought comment on our proposal to award licenses for cellular services by competitive bidding.<sup>13</sup> The comments we received with respect to cellular services focused almost exclusively on the applicability of competitive bidding to applications pending with the Commission.<sup>14</sup> Outside of the pending application issue, no commenter disputed the applicability of competitive bidding to cellular services.<sup>15</sup> We indicated in the *Competitive Bidding Second Report and Order* that unless specifically excluded, mutually exclusive applications in the Public Mobile Services filed on or after July 26, 1993, including cellular service, would be subject to competitive bidding.<sup>16</sup> With respect to applications filed prior to July 26, 1993, the

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<sup>10</sup> See *Cellular NPRM*, 5 FCC Rcd 1044.

<sup>11</sup> *First R&O/MO&O*, 6 FCC Rcd at 6216-19, ¶¶ 75-80.

<sup>12</sup> *Id.* at 6217, ¶ 75; see also, *Competitive Bidding MO&O*, 9 FCC Rcd at 7387, ¶ 19.

<sup>13</sup> Implementation of Section 309(j) of the Communications Act - *Competitive Bidding, Notice of Proposed Rule Making*, PP Docket No. 93-253, 8 FCC Rcd 7635, 7661-2, ¶¶ 147-60 (1993)

<sup>14</sup> See e.g., comments of John G. Andrikopoulos, *et al.*, Abbey Dilley, and John Dudinsky filed in PP Docket No. 93-253; see also Implementation of Section 309(j) of the Communications Act - *Competitive Bidding, Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2359, ¶ 60 (1994) ("*Competitive Bidding Second Report and Order*").

<sup>15</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359, ¶ 61.

<sup>16</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359, ¶ 61; see also Budget Act, Pub.L.No. 103-66, § 6002(e), 107 Stat. 312, 397 (1993).

Commission determined to use lotteries to award licenses for those cellular unserved areas.<sup>17</sup> In markets where a cellular unserved area license was granted under the lottery process, and the license was cancelled for failure to construct or was later revoked, the unserved area reverts to the Commission for licensing. In these instances, we will accept applications for the unserved area under the new rules adopted herein and select the licensee by auction.<sup>18</sup> In markets where a tentative selectee was chosen who filed prior to July 26, 1993, but ultimately the application was denied, we will decide how to proceed to award these types of cellular licenses in the future.<sup>19</sup> In the *Competitive Bidding Second Report and Order*, we established general rules and procedures to govern the competitive bidding process and indicated that we would issue further Reports and Orders to adopt rules to award licenses for each auctionable service or class of service.<sup>20</sup>

5. In this *Ninth Report and Order*, we establish specific competitive bidding rules for licensing mutually exclusive initial cellular radiotelephone licenses for Phase I and Phase II unserved areas.<sup>21</sup> These auction rules will serve our goals of providing service to the public expeditiously, ensuring that all qualified applicants have an opportunity to compete for a license, and deterring the submission of speculative applications.<sup>22</sup> Section 309(j) of the Communications Act, gives the Commission explicit authority to employ competitive bidding procedures where (1) mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission; (2) the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications

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<sup>17</sup> *Competitive Bidding MO&O*, 9 FCC Rcd at 7387, ¶¶ 2, 17. Under the lottery procedures, the winner of the lottery was subjected to a preliminary review. If the lottery winner passed the preliminary review, it was designated the tentative selectee. This designation also caused the time period to begin for the filing of petitions to deny. If the Commission awarded the license to the tentative selectee, the order or public notice awarding the license dismissed all other mutually exclusive applications for that particular unserved area. If the license was not granted, another lottery was held among the applicants in the original lottery. See *First R&O/MO&O*, 6 FCC Rcd at 6218-9, ¶ 79.

<sup>18</sup> Section 6002(e)(2) of the Budget Act of 1993 prohibits awarding licenses by random selection if mutually exclusive applications were accepted after July 26, 1993. See Budget Act, Pub.L.No. 103-66, § 6002(e), 107 Stat. 312, 397 (1993).

<sup>19</sup> In this connection, we note that licensing for cellular unserved areas in approximately 23 RSAs is subject to ongoing litigation. See *Applications of Algreg Cellular Engineering, Memorandum Opinion and Order*, 9 FCC Rcd 6753 (1994) (review pending).

<sup>20</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360, ¶ 68.

<sup>21</sup> See *First R&O/MO&O*, 6 FCC Rcd at 6216, ¶ 75.

<sup>22</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349, ¶¶ 4-6.

signals; and (3) the objectives set forth in Section 309(j)(3) of the Communications Act would be promoted.<sup>23</sup>

### III. COMPETITIVE BIDDING FOR CELLULAR UNSERVED AREAS

#### A. Competitive Bidding Design

6. In the *Competitive Bidding Second Report and Order*, we established the criteria for selecting from among auction methodologies for each service and prescribed rules and procedures for general and specific use.<sup>24</sup> Generally, we concluded that awarding licenses to those parties who value them most highly would foster Congress's policy objectives. We also noted in the *Competitive Bidding Second Report and Order* that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also found that multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.<sup>25</sup> We have used this auction methodology for narrowband and broadband PCS,<sup>26</sup> Multipoint Distribution Service,<sup>27</sup>

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<sup>23</sup> These objectives are:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and (D) efficient and intensive use of the electromagnetic spectrum.

47 U.S.C. § 309(j)(3).

<sup>24</sup> *Competitive Bidding Second Report and Order*; recon. *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

<sup>25</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360, ¶ 69.

<sup>26</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, 5543-44, ¶¶ 28-32 (1994) ("*Competitive Bidding Fifth Report and Order*") (broadband PCS); see also In the Matter of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941, 2948, ¶¶ 18-19 (1994) ("*Competitive Bidding Third Report and Order*") (narrowband PCS).

<sup>27</sup> See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, PP Docket 93-253, *Report and Order*, FCC 95-230, 10 FCC Rcd 9589 (1995) ("*MDS Report and Order*").

and 900 MHz Specialized Mobile Radio ("SMR")<sup>28</sup> services and intend to use this methodology for the 800 MHz SMR service and 220 MHz service auctions.<sup>29</sup>

7. Simultaneous Multiple Round Auction. We decided in the *Competitive Bidding Second Report and Order* that licenses may be auctioned either sequentially or simultaneously.<sup>30</sup> In a sequential auction, licenses are auctioned one at a time.<sup>31</sup> That is, bidding ends on one license before bids are accepted for another license, as is typically the case in an open outcry auction. In a simultaneous auction, bidding for several licenses, or groups of licenses, occurs all at once.<sup>32</sup> We noted that there are intermediate designs between sequential and simultaneous round auctions.<sup>33</sup> Previously, we have used simultaneous multiple round auctions only where licenses are highly interdependent. Although we do not expect a high degree of interdependence among cellular unserved area licenses, we are electing to use a simultaneous multiple round auction because of its administrative efficiency, as demonstrated in the successful narrowband PCS, broadband PCS, MDS, and 900 MHz SMR auctions.

8. We have developed and successfully conducted auctions utilizing software and a computer system capable of handling more than one thousand licenses in a simultaneous multiple round auction. This methodology affords us administrative convenience and enables us to conduct an auction quickly and efficiently. The expertise we have gained and the software we have developed now make it more cost-effective to conduct a simultaneous multiple round auction. We retain the discretion in the future to use an alternative competitive bidding design (e.g., oral outcry) if it is more appropriate due to the number of licenses involved.

9. Stopping Rules for Multiple Round Auctions. In a multiple round auction, a

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<sup>28</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PP Docket 93-253, FCC 95-395, 11 FCC Rcd 2639 (1995) ("900 MHz Reconsideration Order").

<sup>29</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, PR Docket No. 93-144, FCC 95-501, 11 FCC Rcd 1463 (1995) ("800 MHz First Report and Order"); see also, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, *Second Memorandum Opinion and Order and Third Further Notice of Proposed Rulemaking*, PP Docket No. 93-253, FCC 95-312, 11 FCC Rcd 188 (1995).

<sup>30</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2363, ¶ 86.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

stopping rule must be established to determine when the auction is over.<sup>34</sup> Three types of stopping rules may be employed in simultaneous multiple round auctions: markets may close individually, simultaneously, or a hybrid approach may be used.<sup>35</sup> Under an individual, license-by-license approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid on any license. This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule (see discussion *infra* at ¶ 17) is imposed.<sup>36</sup> A hybrid approach combines the two stopping rules. For example, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler license-by-license closings.

10. For the cellular unserved auctions, we will use a simultaneous stopping rule. Bidding will remain open on all licenses until bidding stops on every license. We intend to close the auction after one round passes in which no new valid bids or proactive activity rule waivers (see discussion *infra* at ¶ 21) are submitted.<sup>37</sup> The Commission, however, retains the discretion to keep the auction open even if no new valid bids and no proactive waivers are submitted. The Commission delegates to the Wireless Telecommunications Bureau ("Bureau") the authority to exercise such discretion. In the event that the Bureau exercises this discretion, the effect would be the same as if a bidder had submitted a proactive waiver.<sup>38</sup> Because we will also impose an activity rule (see discussion *infra* at ¶ 17), we believe that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until the final rounds.<sup>39</sup> In addition, the Commission will retain the discretion to declare after a certain

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<sup>34</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶ 127.

<sup>35</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5552, ¶ 46; see also *900 MHz Second Report and Order* at ¶¶ 81-83.

<sup>36</sup> *Id.* at 5552, ¶ 46.

<sup>37</sup> See *id.*

<sup>38</sup> This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction. See *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7684, 7685 (1994).

<sup>39</sup> See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5552, ¶ 46.

number of rounds that the auction will end after some specified number of additional rounds and delegates to the Bureau the authority to exercise such discretion. If this option is used, we will accept bids only on licenses where the high bid had increased in at least one of the last three rounds.

11. Grouping of Licenses. Under our current rules, applicants for Phase I licenses are required to file an FCC Form 464 within 31 days after the expiration of the five-year build-out period of the authorized system(s) on the channel block requested in the market containing the unserved area.<sup>40</sup> The Phase I process will remain essentially unchanged. Following adoption of these auction rules, however, all Phase I auction applicants, including those who previously filed FCC Form 464s, shall file a short-form application (FCC Form 175) prior to the filing deadline announced by Public Notice. The filing window for Phase I applications will open on the 31st day after the expiration of a market's five-year build-out period. For mutually exclusive Phase I applications that were filed prior to our new FCC Form 175 filing requirement, only the applicants who have timely-filed FCC Form 464 applications will be eligible to submit an FCC Form 175 and participate in the auction for these markets. The auction process will repeat itself approximately every six months until all of the Phase I licenses for which there are mutually exclusive applications have been auctioned. Applicants cannot file more than one Phase I initial application for any cellular market, and Phase I initial applications must not propose any *de minimis* or contract service area boundary extensions.<sup>41</sup> Phase I licensees may file a single major modification application no later than 90 days after the grant of their Phase I initial application. This major modification application may propose *de minimis* or contract service area boundary extensions,<sup>42</sup> or a non-contiguous CGSA provided that the non-contiguous CGSA meets the minimum coverage requirement of Section 22.951 of the Commission's rules.<sup>43</sup>

12. The start of the Phase II process is dependent on the resolution of the Phase I short-form filing deadline. If a Phase I initial application is granted for a market and channel block, Phase II applications for that market and channel block may be filed on or after the 121st day after the Phase I application is granted. If no Phase I initial applications are received, Phase II applications may be filed on or after the 32nd day after the expiration of the relevant five-year build-out period.<sup>44</sup> Competing Phase II applications are subject to a 30-

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<sup>40</sup> See 47 C.F.R. § 22.953, *see also* First R&O/MO&O, 6 FCC Rcd at ¶¶ 54-56.

<sup>41</sup> See 47 C.F.R. § 22.902. Generally, cellular licensees may contract to allow service area extensions into their CGSA and/or unserved areas in their MSA or RSA during their initial 5 year fill-in period.

<sup>42</sup> See 47 C.F.R. § 22.949(a)(3)(I).

<sup>43</sup> 47 C.F.R. § 22.951.

<sup>44</sup> *Id.*



day filing window following a Phase II application's publication in a Public Notice.<sup>45</sup> Phase II applicants should continue to submit an FCC Form 464A and an FCC Form 600 during the appropriate filing windows.<sup>46</sup> For Phase II applications, we will require the FCC Form 600 prior to the FCC Form 175 in order to determine whether mutual exclusivity exists among applicants. Mutual exclusivity will be determined by comparing the technical information contained in each FCC Form 600 to determine whether any applicants are applying for the same specific cell sites in any given cellular unserved area. This differs from the Phase I process, because Phase I applicants are applying for the entire unserved area. Thus, mutual exclusivity may be determined by reviewing the FCC Form 175 application for Phase I licenses. If the Commission determines mutually exclusive Phase II initial applications have been received, these applicants will be required to file a short-form application (FCC Form 175) prior to the filing deadline specified in a Public Notice. The Phase II licenses for which there are mutually exclusive applications will be auctioned in either a separate Phase II auction or as part of a Phase I auction. The Bureau will issue a Public Notice describing the auction process for Phase II licenses prior to any Phase II auctions.

## **B. GENERAL BIDDING ISSUES**

13. Bidding Procedures. Given the space limitations for on-site bidding, we intend to allow only remote bidding for the cellular unserved area licenses auction. Bidders will be able to submit bids from remote locations electronically using special bidding software, or via telephone. We have established a schedule of fees that participants in the competitive bidding process will be assessed for certain on-line computer services, bidding software, and for bidder information packages.<sup>47</sup> By Public Notice, the Bureau will provide additional information to prospective bidders to acquaint them with bidding procedures.<sup>48</sup>

14. Bid Increments and Tie Bids. As we have done in previous auctions, we will

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<sup>45</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GEN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8137, ¶¶ 332-333 (1994) ("*CMRS Third Report and Order*"). A 30-day notice and cut-off procedure was adopted for all CMRS providers governed by Part 22, except cellular unserved area Phase I applications.

<sup>46</sup> See 47 C.F.R. § 22.953, see also *First R&O/MO&O*, 6 FCC Rcd at ¶¶ 54-56.

<sup>47</sup> Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidder's Information Packages in Connection with Auctionable Services, WT Docket No. 95-69, *Report and Order*, FCC 95-308, 60 Fed. Reg. 38, 276 (July 26, 1995). There is a \$2.30 per minute on-line charge. The Remote Bidding Software may be purchased for \$175.

<sup>48</sup> See Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in the Delegated Authority of Other Bureaus, *Order*, 10 FCC Rcd 12751 (1995); see also 47 C.F.R. § 0.331.

establish minimum bid increments for bidding in each round of the auction.<sup>49</sup> The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round.<sup>50</sup> The application of a minimum bid increment speeds the progress of the auction and, along with activity rules, helps to ensure that the auction comes to closure within a reasonable period of time. Although we expect fewer bidders for cellular unserved area licenses than for other auctions, we believe that a minimum bid increment is needed to move the auction along in an efficient manner.

15. We believe a bid increment calculated as a percentage of the high bid will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we will impose a minimum bid increment of five percent of the high bid in the previous round.<sup>51</sup> Applying the percentage calculation is appropriate to provide flexibility for a wide range of license values and will provide timely closure of markets, even where bidding begins at a very low dollar amount.<sup>52</sup> The Commission also retains the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts and delegates to the Bureau the authority to exercise such discretion.<sup>53</sup> The Bureau will announce by Public Notice prior to the auction the general guidelines for bid increments. Where a tie bid occurs, we will determine the high bidder by the order in which the Commission receives the bids.<sup>54</sup>

16. Duration of Bidding Rounds. We will retain the discretion to establish the duration and frequency of bidding rounds (e.g., the number of bidding rounds per day and the length of each bidding round) by Public Notice before each auction and delegate to the Bureau the authority to exercise such discretion. The Bureau will announce any changes to

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<sup>49</sup> See, e.g., *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2953, ¶¶ 30-32. Bid increments have been used in narrowband and broadband PCS auctions and will be used in the 900 MHz SMR service; see also *900 MHz Reconsideration Order* 11 FCC Rcd at 2669, ¶ 72.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2953, ¶ 31.

<sup>52</sup> See, e.g., *Amendments of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Implementation of Section 309(j) of the Communications Act - Competitive Bidding and Implementation of Sections 3(n) and 322 of the Communications Act, Second Order on Reconsideration and Seventh Report and Order*, PR Docket No. 89-553, PP Docket No. 93-253, GEN Docket No. 93-252, FCC 95-395, 60 Fed. Reg. 48,913 at ¶¶ 69-70 (*900 MHz Order*).

<sup>53</sup> *900 MHz Reconsideration Order*, 11 FCC Rcd at 2668, ¶ 70.

<sup>54</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, ¶¶ 124-126.

the duration of or intervals between bidding rounds either by Public Notice prior to the auction, or announcement during the auction.

17. Activity Rules. In the *Second Report and Order*, the Commission adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.<sup>55</sup> The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of bidding units, and to make an upfront payment proportional to that eligibility level. (See discussion of upfront payments at ¶ 29). That is, in each round bidders will be limited to bidding on licenses encompassing no more than the number of bidding units covered by their upfront payment. We will employ the Milgrom-Wilson activity rule for cellular unserved auctions. We believe that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue back-up strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time.

18. The Commission will assign a "bidding unit" value to each cellular unserved license for the purpose of measuring bidding activity and eligibility. In previous auctions, this measure was based on MHz-pops. However, for the cellular unserved auction, each cellular unserved license will be assigned a uniform 5,000 bidding units. This amount will be equal to the upfront payment associated with each cellular unserved license. Licenses on which a bidder is the high bidder at the end of the bid withdrawal period in the previous round count against the maximum eligibility bidding limit. Under this approach, bidders have the flexibility to shift their bids among any licenses for which they have applied so long as, within each round, the total bidding units encompassed by those licenses does not exceed the total number of bidding units on which they are eligible to bid. Under this approach, to preserve their maximum eligibility, bidders are required to maintain a certain level of bidding activity during each round of the auction. The auction is divided into three stages with increasing levels of bidding activity required in each stage of the auction. A bidder is considered active on a license in the current round if the bidder has submitted an acceptable bid for that license in the current round, or has the high bid for that license at the end of the bid withdrawal period in the previous round, in which case, the bidder does not need to bid on that license in the current round to be considered active on that license. A bidder's activity level in a round is the sum of the bidding units associated with licenses on which the bidder is active.

19. We intend to establish the following minimum required activity levels for each stage of the auction: In each round of Stage One of the auction, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing at least 60 percent of the bidding units for which it is currently eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of bidding units upon which a bidder

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<sup>55</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2403, ¶¶ 144-145.

will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined infra, is used). During Stage One, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-thirds (5/3). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its short-form application. In each round of Stage Two, a bidder who wishes to maintain its current eligibility is required to be active on 80 percent of the bidding units for which it is eligible in the current round. During the second stage, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4). In each round of Stage Three, a bidder who wishes to maintain its current eligibility is required to be active on licenses encompassing 95 percent of the bidding units for which it is eligible in the current round. In Stage Three, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty-nineteenths (20/19). The Commission, however, will retain the discretion to set and, by announcement before or during the auction, vary the required minimum activity levels (and associated eligibility calculations) for each auction stage, to control the pace of the auction and delegates to the Bureau the authority to exercise such discretion.

20. Stage Transitions. Stage transitions will be determined by the auction activity level. The "auction activity level" is the sum of the bidding units of licenses for which the high bid increased in the current round as a percentage of the total bidding units of all licenses offered in the auction.<sup>56</sup> The cellular unserved auction will begin in Stage One and generally will move from Stage One to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. The auction generally will move from Stage Two to Stage Three when the auction activity level is below five percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. The Commission will retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, including, but not limited to, the auction activity level as defined above, the percentage of licenses (measured in terms of bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Commission delegates to the Bureau the authority to exercise such discretion.

21. Activity Waivers. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. Some waiver procedure is needed because the Commission does not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the

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<sup>56</sup> See, e.g., *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5555, n. 33.

bidder's control.<sup>57</sup>

22. We will provide bidders five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity level is below the required activity level, a waiver will be applied automatically. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be applied automatically. A waiver will preserve current eligibility in the next round. An activity rule waiver applies to an entire round of bidding and not to a particular service area.

23. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.<sup>58</sup> If a bidder overrides the automatic waiver mechanism, its eligibility will be permanently reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open. Bidders will have the option of entering an activity rule waiver proactively during the bid submission period.<sup>59</sup> If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

24. The Commission will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control and delegates to the Bureau the authority to exercise such discretion. The Bureau will also have the flexibility to adjust by Public Notice prior to an auction the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.<sup>60</sup>

### **C. Procedural, Payment, and Penalty Issues**

#### **1. Pre-Auction Application Procedures**

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<sup>57</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2372, ¶ 140.

<sup>58</sup> See *Implementation of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6861 (1994) at ¶15 ("*Competitive Bidding Fourth Memorandum Opinion and Order*").

<sup>59</sup> A proactive waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

<sup>60</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373, ¶ 145.

a. Existing Mutually Exclusive Applications

25. In the *Competitive Bidding Second Report and Order*, we established general rules and procedures for participating in auctions and noted that such rules and procedures might be modified on a service-specific basis.<sup>61</sup> For the cellular unserved area licenses we will adopt generally the application filing and processing rules outlined in the *Competitive Bidding Second Report and Order*.<sup>62</sup> Before each scheduled auction for cellular unserved area licenses, the Bureau will release an initial Public Notice announcing the auction. This initial Public Notice will specify the license(s) to be auctioned, the time and place for the auction, and other important information concerning the procedures, terms, and conditions of the auctions.<sup>63</sup> The initial Public Notice will also specify the filing deadline for short-form applications.

26. Short-Form Applications (FCC Form 175). Potential bidders who currently have long-form applications (FCC Form 401<sup>64</sup> or FCC Form 600) on file for the cellular unserved area licenses being offered in the first auction will be required to submit a short-form application (FCC Form 175) by a date specified in the initial Public Notice to participate in the cellular unserved area auction.<sup>65</sup> Those applicants who filed their applications on the FCC Form 401 will be required to resubmit their applications on an FCC Form 600, and we will waive the filing fee for the FCC Form 600. Those applicants will not have to repeat information which is contained on the FCC Form 401. We do not believe requiring all applicants to file a short-form application is burdensome to applicants who filed previously because the information requirement is not substantial. Submitting a short-form application may be beneficial to these applicants, because they may wish to list additional markets for which they seek bidding eligibility.

27. In addition, this requirement will provide current applicants with the opportunity to file their short-form applications electronically. The Commission is moving toward electronic filing of short-form applications to streamline the administrative process for auction participants. The Bureau will provide detailed instructions on electronic filing in a Public Notice prior to the auction. For the first auction for cellular unserved area licenses, all other potential bidders (e.g., those who currently do not have applications on file) will also be

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<sup>61</sup> See 47 C.F.R. Part 1, Subpart Q.

<sup>62</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2375, ¶ 160.

<sup>63</sup> See, e.g., *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2958, ¶ 43.

<sup>64</sup> The FCC Form 401 was the original long-form application for cellular unserved applications.

<sup>65</sup> The FCC short-form application (FCC Form 175) has been revised, and the form used for auctions prior to October 1995 will no longer be accepted.

required to submit, either electronically or manually, a short-form application by the date specified in the Public Notice announcing the auction. If the Commission receives only one application that is acceptable for filing for a particular frequency block and there is thus no mutual exclusivity,<sup>66</sup> the Bureau will cancel the auction for this license. Phase I applicants would then file a long-form application (FCC Form 600) by a date established by the Bureau. Phase II applicants would not file another long-form application (FCC Form 600), since one would already be on file.

28. Amendment and Modifications. To encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. On the date set for submission of corrected applications, applicants that discover minor errors in their applications (e.g., typographical errors or incorrect license designations) will be permitted to file corrected applications. Applicants will not be able to make any major modifications to their short-form applications, including, but not limited to, changes in license areas or additions of other bidders into the bidding consortia, until after the auction.<sup>67</sup> The Commission has waived the *ex parte* rules as they apply to the submission of amended short-form applications, to maximize applicants' opportunities to seek Commission staff advice on making such amendments.<sup>68</sup> We will waive the *ex parte* rules as they apply to long-form applications currently on file for the cellular unserved area licenses (applications filed on or after July 26, 1993). The Bureau will issue a Public Notice listing all short-form applications with minor defects. Those applicants will be given an opportunity to cure and resubmit a corrected version of their application. After reviewing the corrected applications, the Commission will release a Public Notice announcing the names of all applicants whose applications have been accepted for filing.

## 2. Upfront Payments

29. In the *Competitive Bidding Second Report and Order*, we stated that an upfront payment would provide some degree of assurance that only serious, qualified bidders would participate in the auction and would serve as a deterrent to the filing of speculative applications which would delay the provision of service to the public.<sup>69</sup> We determined also that the best approach to upfront payments is to retain flexibility to determine the amount of

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<sup>66</sup> The Commission is authorized only to auction mutually exclusive initial applications. 47 U.S.C. § 309(j)(1).

<sup>67</sup> See *Competitive Bidding Second Memorandum Opinion & Order*, 9 FCC Rcd at 7266, ¶ 52.

<sup>68</sup> Commission Announces that Mutually Exclusive "Short-Form" Applications (Form 175) to Participate in Competitive Bidding Process ("Auctions") are Treated as Exempt for *Ex Parte* Purposes, *Public Notice*, 9 FCC Rcd 6760 (1994).

<sup>69</sup> *Id.* at 2378, ¶ 171.

upfront payment on a service-specific basis.<sup>70</sup> In addition, we concluded that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.<sup>71</sup>

30. In order to reduce the complexities of the auction process, we are establishing a uniform, reasonable upfront payment amount of \$5,000 per license, in lieu of the standard upfront payment formula of \$2,500 or \$0.02 per pop per MHz for the largest combination of MHz/pops, whichever is greater.<sup>72</sup> The \$0.02 per pop per MHz formula, when used in the context of more populated areas, can result in a substantial upfront payment which is higher than the expected value of the cellular unserved license. For cellular unserved area auctions, however, we believe that a \$5,000 upfront payment per license will ensure that only serious, qualified bidders participate. In addition, this amount will not place an unreasonable financial burden on entrepreneurs seeking to acquire licenses. A bidder may file applications for every license being auctioned, but its upfront payment should reflect the maximum number of licenses it seeks to win. For purposes of the activity rule, each license will be assigned 5,000 bidding units. Thus, for example, if a bidder submits an upfront payment for three licenses, its maximum eligibility will be 15,000 bidding units.

31. Upfront payments will be due by a date specified by Public Notice, but generally not later than 14 days before a scheduled auction. To receive a bidder identification number, the applicant or its representative will be required to deposit with Mellon Bank, by cashiers' check or wire transfer, at least \$5,000.<sup>73</sup> During the auction, bidders will be required to provide their bidder identification numbers when submitting bids. The highest bidder for each license will be asked to sign a bid confirmation form. The upfront money will later be counted toward the down payment for the license. These procedures should keep the auction process simple and keep costs down for entrepreneurs who wish to bid on only a few licenses.<sup>74</sup> During the period that upfront payment deposits are held pending ultimate award of the license, the interest that accrues will be retained by the Government.<sup>75</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2378, ¶ 172.

<sup>73</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2380, ¶ 187.

<sup>74</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330, 2334 (1994).

<sup>75</sup> See *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 707, 110 Stat. 56, 154 (1996).



### 3. Down Payments and Full Payments

32. Down Payments. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided, as a general matter, in the *Competitive Bidding Second Report and Order* that each winning bidder must tender a down payment sufficient to bring the total deposit up to 20 percent of the winning bid.<sup>76</sup> We believe that a down payment is appropriate for cellular unserved area licenses in order to discourage default between the auction and the award of the license and to ensure payment of the penalty if such default occurs. Therefore, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least 20 percent of the final payment due for the license(s) won in that particular auction. If the upfront payment already tendered amounts to 20 percent or more of the winning bid, no additional deposit will be required. If the upfront payment on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the payment cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses.<sup>77</sup> When it becomes possible to calculate and assess the payments, any excess deposit will be refunded. Upfront payments will be applied to such deposits, and to bid withdrawal and default assessments due, before being applied toward the bidder's down payment on licenses the bidder has won.<sup>78</sup>

33. The winning bidders will be required to submit the required down payment by cashier's check or wire transfer to Mellon bank by a date to be specified by Public Notice, generally within five business days following the close of bidding. The Commission will hold the down payment until the high bidder has been awarded the license and has paid the remaining balance due on the license.

34. Full Payment. Long-form applications (FCC Form 600) will be due from successful Phase I bidders within ten (10) business days after they have been notified of their winning bidder status, including those applicants who have an FCC Form 401 currently on file who are required to refile on FCC Form 600. Thus, FCC Form 600 applications will be due from all successful Phase I bidders on the same date. If a filing fee is required, the general rules governing the submission of fees will apply except for applicants who currently have FCC Form 401 applications on file.<sup>79</sup> Once we have reviewed a long-form application

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<sup>76</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381, ¶ 190.

<sup>77</sup> *900 MHz Reconsideration Order*, 11 FCC Rcd at 2682, ¶ 115.

<sup>78</sup> *Id.*

<sup>79</sup> See 47 C.F.R. §1.1101 *et seq.* These rules provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds, or is otherwise not in compliance with our fee rules; see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, n. 127, ¶ 167.

and have made an initial determination that the applicant is qualified, we will release a Public Notice that the long-form applications have been accepted. This Public Notice will trigger the filing window for petitions to deny. After resolution of petitions to deny, the Commission will later release a Public Notice announcing that the Commission is prepared to award licenses. Applicants will be required to submit full payment for the license(s) within five days of the release of this Public Notice. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the Commission will grant the license generally within ten (10) business days after receiving full payment.

35. Phase I or Phase II applicants with long-form applications (FCC Form 401 or FCC Form 600) currently on file will be permitted to make both minor and major modifications to their FCC Form 600 applications, including ownership changes or changes in the identification of parties to bidding consortia on or before the date of the auction.<sup>80</sup> Other applicants will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia. We believe this distinction is warranted because applicants who filed applications previously submitted these forms any time on or after July 26, 1993, and major revisions to the applicants' information may be necessary given the time period that has elapsed. Prospective bidders in a Phase I auction should be aware that their single major modification application permits them to bid for any license that covers unserved areas in that particular market. Phase II applicants are limited to bidding for the ability to serve only the areas described in the technical parameters shown in their FCC Form 600 application and do not hold any rights to any unserved area not covered in this application.

#### **4. Bid Withdrawal, Default, and Disqualification**

36. We decided in the *Competitive Bidding Second Report and Order* that there shall be a substantial payment assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due.<sup>81</sup> Although we concluded that payment of all amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.<sup>82</sup> Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if

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<sup>80</sup> *Id.* at 2377, ¶¶ 167-68.

<sup>81</sup> *Id.* at 2382-83, ¶¶ 195-98.

<sup>82</sup> *See, e.g., Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2960, ¶ 49.

the subsequent winning bid is lower.<sup>83</sup> After bidding closes, we will apply Section 1.2104(g)(2) of the Commission's rules to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.<sup>84</sup> The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment is made. Entities that obtain their licenses through the auction process will forfeit all monies paid to the Commission if their licenses are revoked or canceled.<sup>85</sup>

37. In the event an auction winner defaults or is otherwise disqualified after an auction is closed, the Commission must exercise our discretion to decide whether to hold a new auction or offer the license to the second highest bidder. In exercising our discretion, the Commission will evaluate the particular facts and circumstances of the specific case.<sup>86</sup> For example, in the context of the cellular unserved area licenses it may be that defaults or disqualifications occur on only a very small number of relatively low value licenses. Therefore, we may choose to offer the license(s) to the highest losing bidder(s) because the cost of conducting an auction may not exceed the benefits. On the other hand, there may be countervailing reasons why we may choose to re-auction such licenses. In the unlikely event that there is more than one bid withdrawal on the same license, we will hold *each* withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission.

## **5. Regulatory Safeguards**

### **a. Transfer Disclosure and Anti-Trafficking Provisions**

38. In the Communications Act, Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payments schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses

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<sup>83</sup> Recently, in *Atlanta Trunking Associates, Inc. and Map Wireless, L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, Order, FCC 96-203 (rel. May 3, 1996), we decided to partially waive these provisions with respect to individual requests for waiver of withdrawal payments as a result of mistaken bids. We fashioned guidelines to address these situations based upon the premise that the appropriate bid withdrawal payment is one that takes into consideration the round and stage in which a mistaken bid is withdrawn. In general, this approach is designed to eliminate the strategic benefit of purposely submitting mistaken bids. Petitions for reconsideration with respect to this Order are currently pending.

<sup>84</sup> See 47 C.F.R. §§ 1.2104(g) and 1.2109.

<sup>85</sup> This requirement includes licensees who fail to meet the construction requirements contained in 47 C.F.R. § 22.946.

<sup>86</sup> See, e.g., *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2962, ¶¶ 51-52.

and permits."<sup>87</sup> In the *Competitive Bidding Second Report and Order*, the Commission adopted safeguards to ensure that the requirements of Section 309(j)(4)(E) are satisfied.<sup>88</sup> We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."<sup>89</sup> Therefore, we imposed a transfer disclosure requirement on all licenses obtained through the competitive bidding process.<sup>90</sup>

39. We conclude that the transfer disclosure requirements of Section 1.2111(a) should apply to all cellular radiotelephone licenses for unserved areas obtained through the competitive bidding process. Licensees transferring their licenses within three years after the initial unserved area license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of their licenses. As we indicated in the *Competitive Bidding Second Report and Order*, we will give particular scrutiny to auction winners who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant.<sup>91</sup>

#### **b. Performance Requirements**

40. The Communications Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."<sup>92</sup> In the *Competitive Bidding Second Report and Order*, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules for all auctionable services.<sup>93</sup> Section

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<sup>87</sup> 47 U.S.C. § 309(j)(4)(E).

<sup>88</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2384-88, ¶¶ 210-226, and 2394-95, ¶¶ 258-265.

<sup>89</sup> *Id.* at 2385, ¶ 214.

<sup>90</sup> See 47 C.F.R. § 1.2111(a).

<sup>91</sup> *Id.*

<sup>92</sup> See 47 C.F.R. § 309(j)(4)(B).

<sup>93</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385, ¶ 219.

22.946 of the Commission's rules<sup>94</sup> requires unserved area licensees to begin service to subscribers within one year after the grant of their authorizations. Failure to meet this requirement will result in termination of the authorization.<sup>95</sup> Furthermore, an unserved area licensee cannot transfer its license until its system has provided service to subscribers for at least one year.<sup>96</sup> We believe that these requirements are sufficient to address the spectrum warehousing concern. Therefore, we will not adopt additional performance requirements for the cellular unserved area licenses.

### **c. Rules Prohibiting Collusion**

41. We will subject cellular unserved area licensees to the rules prohibiting collusion embodied in Section 1.2107(d) and 1.2105(c) of the Commission's rules.<sup>97</sup> Bidders will be required by Section 1.2105(a)(2) to identify on their short-form applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships, or other agreements or understandings that relate to the competitive bidding process. Bidders will be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies, or the particular properties on which they will or will not bid. In light of our decision to apply Section 1.2105 to mutually exclusive cellular radiotelephone applicants for unserved areas, we are modifying Section 22.949(c) which currently provides that settlements among all applicants with mutually exclusive applications (full settlements) for unserved areas must be filed no later than fifteen (15) days before the competitive bidding procedure is scheduled to take place. To provide consistency with auction rules for other services, Section 22.949(c) will now reflect that full settlements must be filed no later than the deadline for the short-form application (FCC Form 175).<sup>98</sup>

42. Although applicants may not make major modifications to their short-form applications, a single member of a bidding consortium may withdraw from a consortium only in a particular RSA or MSA(s), but otherwise remain in the consortium for purposes of bidding on all other markets specified on the short-form application. However, such arrangements to assign the member's interests in particular licenses to other consortium members after the auction must be disclosed on an original or amended short-form

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<sup>94</sup> 47 C.F.R. § 22.946.

<sup>95</sup> 47 C.F.R. § 22.144(b)

<sup>96</sup> 47 C.F.R. § 22.943(b).

<sup>97</sup> 47 C.F.R. §§ 1.2101(d) and 1.2105(c).

<sup>98</sup> See, e.g., *MDS Report and Order*, 10 FCC Rcd at 9660-1, ¶¶ 164-65.

application, and a request to transfer or assign the license also must be filed in conjunction with the long-form application.<sup>99</sup>

43. Section 1.2107(d) provides that, as an exhibit to the long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time the bidding was completed. The rule provides that such agreements must have been entered into prior to the filing of the short-form application. Section 1.2105(c), however, provides an exception to that prohibition for bidders who have not filed short-form applications for licenses in any of the same geographic license areas because of the low risk of anticompetitive conduct among those bidders.<sup>100</sup> Those bidders may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction provided that such changes do not result in a change of control of the applicant.<sup>101</sup> We will also permit communications among bidders concerning matters unrelated to the license auctions, except for communications resulting in a transfer of control of the applicant.<sup>102</sup> In the *Competitive Bidding Second Report and Order*, we adopted a rule prohibiting collusive conduct in the context of competitive bidding.<sup>103</sup> We observed that Section 1.2105(c) of the Commission's rules would serve the objectives of the Communications Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.<sup>104</sup> We believe that these rules are appropriate for the cellular radiotelephone licensing procedures for unserved areas.

## 6. Treatment of Designated Entities

44. The Communications Act provides that, in developing competitive bidding procedures, the Commission shall consider various congressional objectives and several

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<sup>99</sup> See *Letter to Leonard J. Kennedy, Esq. From Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 14, 1994.

<sup>100</sup> See 47 C.F.R. § 1.2105(c)(3).

<sup>101</sup> 47 C.F.R. § 1.2105 (c)(2).

<sup>102</sup> *Public Notice*, DA 95-2244, Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, released Oct. 26, 1995. But see *Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules.).

<sup>103</sup> See 47 C.F.R. § 1.2105(c); see also *Competitive Bidding Second Memorandum Opinion and Order* at 725-54, ¶¶ 50-53 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Erratum, PP Docket No. 93-253, rel. Oct. 19, 1994.

<sup>104</sup> See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-87, ¶¶ 221-25.

alternative methods for achieving those objectives. Specifically, Section 309(j) provides that in establishing eligibility criteria and bidding methodologies the Commission shall:

. . . promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.<sup>105</sup>

The statute also requires the Commission to ensure that such "designated entities" are given the opportunity to participate in the provision of spectrum-based services.<sup>106</sup> To achieve this goal, the statute indicates that the Commission should consider the use of bidding preferences and other procedures.<sup>107</sup> Section 1.2110 of the Commission's rules establishes a menu of preferences, including installment payments and bidding credits, from which to choose in selecting the designated entity provisions for a particular service.<sup>108</sup>

45. We believe it is unnecessary to create special provisions for designated entities in the auctions for cellular unserved area radiotelephone licenses. Unlike broadband PCS, which is a new service that attracts many entrepreneurs to the wireless telecommunications arena, unserved area licenses in the cellular radiotelephone service are highly specialized licenses that are valued mainly by a discrete group of entrepreneurs. In addition, because cellular unserved area radiotelephone service, characterized by small geographic areas that were not covered by the initial cellular licensee during the five-year build-out period, is not a capital-intensive service, we expect that designated entities who are interested in participating in provision of the service will more easily access the capital needed to participate in the auction.

#### IV. PROCEDURAL MATTERS

##### A. FINAL REGULATORY FLEXIBILITY ANALYSIS

46. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the

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<sup>105</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>106</sup> Small businesses, rural telephone companies and businesses owned by members of minority groups and women are collectively referred to as "designated entities". See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 227.

<sup>107</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>108</sup> See, e.g., *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5581, ¶ 114.

Commission's final analysis is as follows:

47. Need for and purpose of the action. As a result of the Budget Act referenced above, the Commission may utilize competitive bidding mechanisms in the grant of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis (IRFA) within the *Notice of Proposed Rule Making* in PP Docket No. 93-253 and published a Final Regulatory Flexibility Analysis within the *Competitive Bidding Second Report and Order* in PP Docket No. 93-253. As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses.

48. Issues raised in response to the IRFA. The IRFA in PP Docket No. 93-253 noted that the proposals under consideration in the *NPRM* included the possibility of new reporting and recordkeeping requirements for a number of small business entities. No commenters responded specifically to the issues raised in the IRFA. We have made some modifications to the proposed requirements as appropriate.


49. Significant alternatives considered and rejected. All significant alternatives have been addressed in the *Competitive Bidding Second Report and Order*.

#### **B. ORDERING CLAUSES**

50. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(I), 303(r), 309(j), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(I), 303(r), 309(j), and 332, this *Ninth Report and Order* is adopted and Part 22 of the Commission's Rules IS AMENDED as set forth in the attached Appendix A.

51. IT IS FURTHER ORDERED that the rule amendments set forth in Appendix A WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary



## **APPENDIX A FINAL RULES**

Part 22, Subpart H, of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

### **PART 22 - PUBLIC MOBILE SERVICES**

1. The Authority citation for Part 22 is revised to read as follows:

Authority: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, 309 and 332, unless otherwise noted.

2. Section 22.943 is revised by adding paragraph (b)(3) to read as follows:

**Section 22.943 Limitations on assignments and transfers of cellular authorizations.**

\* \* \* \*

(b) \* \* \*

(1) \* \* \*

(2) \* \* \*

(3) An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the other documents and information set forth in Section 1.2111 of this chapter.

3. Section 22.949 is amended by revising paragraph (c) to read as follows:

**Section 22.949 Unserved area licensing process.**

\* \* \* \*

(c) Settlements among some, but not all, applicants with mutually exclusive application for unserved areas (partial settlements) are prohibited. Settlements among all applicants with mutually exclusive applications (full settlements) are allowed and must be filed no later than the date that the FCC Form 175 (short-form) is filed.

\* \* \* \* \*